

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No.: 153697
Court of Appeals No. 324963
Lower Court Case No. 14-19392-FC

V

JOSE L. GARCIA-MANDUJANO,

Defendant-Appellant.

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DEFENDANT-APPELLANT'S REPLY BRIEF

DATED: December 13, 2017

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Strickland v. Washington, 466 US 668, 687 (1984)1,2

STATEMENT OF QUESTIONS

DID DEFENSE COUNSEL’S FAILURE TO INTERVIEW THE PHYSICIAN’S ASSISTANT BEFORE TRIAL AND FAILURE TO IMPEACH HER TESTIMONY AT TRIAL CONCERNING THE EXAMINATION OF COMPLAINANT WITH AN ADULT SPECULUM DENY THE DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL BY CONTRAVENING TRIAL COUNSEL’S CHOSEN STRATEGY OF CHALLENGING THE CREDIBILITY OF COMPLAINANT

Defendant-Appellant Answers the Question “YES”

The People Answer the Question “NO”

The Court of Appeals Answered the Question “NO”

ARGUMENT

DEFENSE COUNSEL'S FAILURE TO INTERVIEW THE PHYSICIAN'S ASSISTANT BEFORE TRIAL AND FAILURE TO IMPEACH HER TESTIMONY AT TRIAL CONCERNING THE EXAMINATION OF COMPLAINANT WITH AN ADULT SPECULUM DENIED THE DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL BY CONTRAVENING TRIAL COUNSEL'S CHOSEN STRATEGY OF CHALLENGING THE CREDIBILITY OF COMPLAINANT

According to the People's argument, the sole trial strategy of defense counsel was to challenge the credibility of the complainant. If that is the case, trial counsel's performance still fell below an objective standard of reasonableness in the prevailing professional norms. *Strickland v. Washington*, 466 US 668, 687 (1984). His performance demonstrated a reasonable probability that but for the deficiency, the result of the proceedings would have been different and were fundamentally unfair and unreliable. *Id.* at 694.

Defense counsel's failure to interview the physician's assistant and to impeach her at trial regarding the omission of the adult speculum in her written report directly related to the credibility of the complainant before the jury. All of the testimony regarding the allegations of criminal sexual conduct was limited to what the complainant testified to versus what the Defendant testified to. Under the circumstances of the present case, the testimony of the complainant was not inherently more believable than that provided by the Defendant.

When the physician's assistant testified as to her examination of the complainant with an adult speculum, the scales tipped decisively in favor of the complainant. Failure to discover anything about that examination by the physician's assistant, or to question her as to why such an important aspect of her physical examination of the complainant was missing from the findings in her progress notes, could only leave the jury with a definite and firm conviction that Defendant had committed the acts that heretofore the complainant only testified to.

The physician's assistant's speculum testimony provided physical evidence to bolster the

complainant's testimony; it also provided the **only** physical evidence in the case to establish that a rape had occurred. Thus, not only the medical examination of complainant with the speculum by the physician's assistant, but the failure to challenge its very existence left the jury with no other conclusion than that the physician's assistant did in fact use the adult speculum. Challenging the physician's assistant through impeachment of her report could have led the jury to question not only whether it was used, but also question the credibility of the physician's assistant herself.

The prosecutor used the physician's assistant testimony to corroborate the complainant's testimony. In its own right, the physician's assistant testimony was highly damaging, but the prejudicial effect against the Defendant was the fact that it was seen to corroborate, and used by the prosecutor to corroborate, the complainant's testimony of sexual penetration in the Defendant's trailer. Thus, far from altering or deviating from the defense counsel's trial strategy of making the complainant's credibility an issue, his failure to interview the physician's assistant or to impeach her testimony detracted from his chosen strategy. Thus, both prongs of the *Strickland* standard have been satisfied and justify reversal of Defendant's convictions and remand for new trial.

CONCLUSION

For the reasons and authority set forth above, Defendant-Appellant respectfully requests that this Court set aside his conviction and sentence and remand the proceedings for a new trial.

Dated: December 13, 2017

/s/John T. Burhans

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